

**Supplemental Letter of Findings: 04-20210427  
Gross Retail and Use Tax  
For the Years 2017 and 2018**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Supplemental Letter of Findings.

### HOLDING

The Department agreed with Indiana Maintenance Company that its provision of additional exemption certificates, an additional direct pay permit, and invoices documenting the purchase of two capital assets justified a review and adjustments of the Department's original audit assessments of sales and use tax.

### ISSUE

#### **I. Gross Retail and Use Tax - Exempt Purchases and Sales.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-8-8; IC § 6-2.5-8-9; IC § 6-8.1-5-1; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, (Ind. Tax Ct. 2007); [45 IAC 2.2-3-4](#); Black's Law Dictionary (11th ed. 2019).

Taxpayer argues that the Department's assessment of additional sales/use tax is overstated because it can now provide documentation that certain of its purchases were exempt from the Indiana tax.

### STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of providing machinery maintenance and testing services on behalf of manufacturers and utility companies.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records and tax returns. The audit resulted in an assessment of additional tax on the ground that Taxpayer sold items to customers without collecting sales tax and that Taxpayer did not collect or retain those customers' exemption certificates.

The Department's audit allowed Taxpayer 30 days in which to obtain Form AD-70's from the customers at issue. The AD-70 is a "Special Sales/Use Tax Exemption Certificate" by which the purchaser of an item certifies that it was entitled to purchase that item without paying Indiana's sales tax. However, Taxpayer was unable to provide the certificates or establish that its customers were not subject to the tax.

A further examination of Taxpayer's records found that Taxpayer made purchases of items for its own use without paying sales tax to the vendor.

The audit resulted in proposed assessments of additional sales and use tax. Taxpayer objected to the proposed assessment and submitted a protest to that effect. An administrative hearing was scheduled for February 2021. According to the Department's records, "Neither the taxpayer nor taxpayer representative appeared at the hearing on February [] 2021 at 1:00 PM." Taxpayer's original protest, docketed as 04-20200427, was "administratively closed."

Thereafter, Taxpayer objected and requested a hearing on the matter. Taxpayer's request was granted and the protest docketed as 04-20210427.

This Supplemental Letter of Findings results.

#### **I. Gross Retail and Use Tax - Exempt Purchases and Sales.**

## DISCUSSION

The issue is whether Taxpayer has presented documentation sufficient to warrant an adjustment of the sales and use tax proposed assessments. As a retail merchant, Taxpayer must document that it properly sold tangible property to its customers who claimed tax-exempt status without collecting sales tax. In addition, Taxpayer consumed tangible property during the course of its business and thus, Taxpayer must also document that the property it bought for its own use is not subject to Indiana's use tax.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[w]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Sales tax is imposed by IC § 6-2.5-2-1, which states in relevant part:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

However, the merchant is not required to collect the tax if the buyer provides an exemption certificate. IC § 6-2.5-8-8(a):

A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

Use tax is imposed by IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is used, stored, or consumed in Indiana, use tax is due if sales tax was not paid at the time of the transaction, unless an applicable exemption is available. [45 IAC 2.2-3-14](#).

### A. Exemption Certificates:

Taxpayer has presented exemption certificates provided by its customers. The Department's audit found its original "review of sales records revealed sales of tangible personal property to customers and the [T]axpayer did not have a valid exemption certificate on file." Taxpayer has now corrected that error and the Department agrees that the assessment should be adjusted to reflect those newly provided exemption certificates because, as IC § 6-2.5-8-8(a) explains, "A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase."

### **B. Direct Pay Permit:**

Taxpayer failed to provide an exemption certificate from one particular customer. Instead, it explains that because this one company "holds a direct pay permit," Taxpayer "is barred from collecting sales tax since [customer] makes its own determination of taxability and is responsibility of those taxes."

IC § 6-2.5-8-9 provides in part:

(a) A retail merchant, manufacturer, or wholesaler who is registered under this chapter may apply for a direct payment permit. The department may issue the permit subject to such conditions as it deems reasonable. A permit issued under this subsection does not expire and is valid unless revoked under subsection (c).

(b) A person who possesses a direct payment permit may, at the time of a retail transaction, issue a direct payment certificate to a retail merchant instead of paying the state gross retail or use tax to that merchant. If the person issues a direct payment certificate, the person must then pay the tax on that purchase directly to the department. *A retail merchant who receives a direct payment certificate has no duty to collect or remit the state gross retail or use tax on that transaction. (Emphasis added).*

In the case of the direct pay permit Taxpayer has now provided, Taxpayer was not required to collect sales tax on sales to that customer.

### **C. Capital Asset Purchases.**

The audit report indicates that its "review of the capital assets revealed that [T]axpayer purchased various items for which no documentation or vendor receipts were provided demonstrating that sales tax was paid or use tax remitted."

A "capital asset" is a "long-term asset used in the operation of a business or used to produce goods services, such as equipment, land, or an industrial plant." Black's Law Dictionary 145 (11th ed. 2019) See *also* Black's Law Dictionary 145 (9th ed. 2009). In Taxpayer's case, the Department's audit found that - among other items - Taxpayer had purchased a computer and two vehicles with no indication that it paid sales tax or self-assessed use tax on those acquisitions.

Taxpayer provided a "capital assets workpaper" listing a series of capital asset invoices. Taxpayer provided copies of two invoices documenting the purchases of two Ford vehicles which - for specificity's sake - indicate sales tax paid of \$2,464.00 and \$2,948.96. Subject to the Department's review, the assessment of use tax on Taxpayer's purchases of capital assets should be adjusted to reflect these amounts of sales taxes paid.

Taxpayer's protest is sustained subject to the Department's review of the newly provided exemption certificates, its customer's direct pay permit, and the two invoices documenting the purchase of vehicles and Taxpayer's payment of sales tax on those vehicles.

### **FINDING**

To the extent described above and subject to the Audit Division's review of the newly supplied documentation, Taxpayer's protest is sustained.

August 19, 2021

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